



SHERIFF APPEAL COURT

**[2025] SAC (Civ) 35
PER-CA22-22**

Sheriff Principal N A Ross

OPINION OF THE COURT

delivered by SHERIFF PRINCIPAL N A ROSS

in the appeal in the cause

COLIN GILLAN

Pursuer and Respondent

against

MARK SINCLAIR

Defender and Appellant

**Pursuer and Respondent: Shabbir, advocate; Gilson Gray LLP
Defender and Appellant: MacRae; Gilmartin Finlay MacRae**

16 October 2025

[1] The appeal challenges a sheriff's decision not to award expenses under Chapter 27A of the Ordinary Cause Rules 1993 ("OCR") following a successful counterclaim.

Chapter 27A entitles a pursuer to enrol a motion for expenses if (in brief summary) (a) he has lodged in process an offer to accept a specified sum, inclusive of interest, together with expenses to settle his claim; (b) the offer was a genuine attempt to settle the claim; (c) the offer was neither withdrawn nor accepted; and (d) the sheriff subsequently pronounced judgment for a sum which was at least as favourable.

[2] The appellant is not the pursuer, but is the defender who lodged a counterclaim. He made an offer to settle the counterclaim, which was lower than the sum subsequently awarded. The principal action was dismissed for failure to appear, and decree *de plano* granted in the counterclaim. The appellant enrolled for an additional sum under Chapter 27A, on the basis that he had made the equivalent of a successful pursuer's offer to settle the counterclaim. The sheriff found that, applying the principles of statutory interpretation, Chapter 27A was not available to a defender in a counterclaim, and refused the award of an additional sum as incompetent. The issue underlying this appeal is whether Chapter 27A applies to a successful offer by a defender in a counterclaim.

[3] That is not a question which can be resolved in this Decision, because the respondent raised two subsidiary questions of competency as preliminary points, which required answer before this appeal could be permitted to proceed to a hearing on the merits.

[4] The first challenge arose from the appellant's alleged failure to follow the procedural requirements for lodging an account of expenses. OCR 32.1A(1)(a) requires an account of expenses to be lodged within 4 months of final judgment. That was not done. The second challenge alleged that the appeal was incompetent because, even if the appellant were entitled to an award under Chapter 27A, no motion for an additional sum could be made until taxation had taken place. No account had been lodged, and therefore no taxation had taken place.

[5] This Decision deals only with these subsidiary questions of competency, following submissions at a preliminary hearing.

The respondent's submissions

[6] Counsel for the respondent submitted that failure to lodge an account of expenses results in the loss of entitlement to an award (*Stuart (Finlayson's Guardian) v Scottish Rig Repairers* 2006 SLT 329 at para [20]). Decree was pronounced on 24 June 2024. The time limit under OCR 32.1A(3) for an account to be lodged was 4 months. There had been an appeal, but this were finally refused at latest by 14 November 2024, so the latest an account was due was 14 March 2025. No account had ever been lodged. The present appeal related to an additional sum, which could not exist independently of a valid entitlement to expenses, which in turn could not exist until an account had been lodged and the taxation process completed.

[7] Secondly, the motion for an additional sum, even if competent, was premature and incompetent. A motion under Chapter 27A must be made no later than the granting of "decree for expenses as taxed" (OCR 27A.8(4)) which phrase has been interpreted as referring to post-taxation decerniture (*Gray v Cape t/a Briggate Investments* 2023 SLT (SAC) 139, para [32]). There had been no taxation.

The appellant's submissions

[8] The agent for the appellant submitted that OCR 32.1A did not impose an absolute deadline of 4 months. While an account required to be lodged not later than 4 months after the final judgment, there was nonetheless a residual provision that an account could be lodged "at any time with permission of the sheriff but subject to such conditions, if any, as the sheriff thinks fit to impose." (OCR 32.1A(1)(b)). It was for the Auditor to determine whether the account was lodged outwith the 4 month deadline. The question could be remitted to the sheriff. No account had been prepared because it was not known whether

the appeal would be successful. If it were, the cost of taxation would be wasted. This point could not be resolved until 14 November 2024 when permission to appeal to the Court of Session (of the underlying decree on the merits) was finally refused. The motion under Chapter 27A was enrolled on 5 March 2025, and continued thereafter. The question of lateness was one for the sheriff and/or the auditor. There may be more than one “final decision”, the definition under section 2014 of the Courts Reform (Scotland) Act referring to “a”, not “the” decision. The interlocutor dealing with this motion was a final interlocutor.

[9] The motion was not premature. In *Gray* (above) the court decided that the phrase “no later than the granting of decree as taxed” (OCR 27A.8(4)) meant “no later than the decree decerning for payment of expenses as taxed”. The court did not determine that the motion could not be lodged until after taxation. To find otherwise would create uncertainty: if a motion could not be lodged until after taxation, the successful party would have to wait to see if objection to taxation was lodged, but if none were forthcoming the court may forthwith proceed to grant decree, thereby thwarting any application for a Chapter 27A fee.

Decision

[10] In cases where Chapter 27A applies, (and recognising that the extent of the category of “pursuer” remains the subject of this appeal) the pursuer may enrol a motion under OCR 27A.8(3), for an additional sum calculated under OCR 27A.9. The entitlement, if any, of the appellant to an award of expenses for a successful offer depends entirely on the scheme created by Chapter 27A. The scheme of the chapter has both procedural and substantive requirements.

[11] OCR 27A.8(1) regulates the position where, as in the present case, an offer was made and not withdrawn, the offer was not accepted, the sheriff pronounced judgment, and the

judgment was at least as favourable in money terms as the sum offered. In the ordinary case the sheriff must “on the pursuer’s motion” and except on cause shown, decern against the defender for payment to the pursuer of a sum calculated in terms of OCR 27A.9. The latter provision identifies that sum as:

“a sum corresponding to half the fees allowed on taxation of the pursuer’s account of expenses, in so far as those fees are attributable to the relevant period, or in so far as they can reasonably be attributed to that period.”

[12] Accordingly, before such a sum can be awarded, there requires to be (i) a pursuer’s motion, which (ii) was lodged no later than the granting of decree for expenses as taxed (OCR 27A.8(4); and there exists a means of identifying what charges were allowed on taxation, which further requires that the pursuer (iii) has already prepared and submitted an account of expenses, and (iv) has lodged that account not later than 4 months following final judgment (OCR 32.1A(1)), or later with the court’s permission, and (iv) a taxation has taken place and has resulted in charges being allowed.

[13] In the present case, the appellant enrolled a motion, albeit long after the appeal had been finally dismissed. The motion was enrolled on 5 March 2025. In order to have been enrolled timeously for the purposes of OCR 27A.8(4), it required to be lodged no later than the granting of “decree of expenses”. That formula is ambiguous as to whether it refers to the initial decree for expenses to be subsequently taxed, or the subsequent decree for the expenses allowed following taxation. This court has already decided (*Gray*, above) that this means the latter. There has been no decree for award of expenses following taxation, so it follows that the motion was, despite considerable delay, lodged timeously. There is nothing within OCR 27A.8(4) which requires, or infers, that accounts have previously been prepared, or that taxation has taken place. It is a simple limitation provision.

[14] The remaining requirements, however, are a different matter. The sum to be decerned for must be calculated by reference to the charges allowed on taxation of the pursuer's account of expenses. The appellant has not prepared and submitted an account of expenses, far less met the 4-month deadline for doing so, or applied for extension of that deadline. Taxation has not taken place.

[15] These omissions mean that no award can competently be sought or made under OCR 27A.9. The mechanism for calculation of the sum is defeated. There is no alternative mechanism for calculation. The court cannot award any sum. The appellant's claim for decerniture under OCR 27A(3) is therefore incompetent. This appeal is thereby rendered academic, because no sum could be awarded even if the appellant were successful in establishing any right to apply for it.

[16] For completeness, I do not accept the appellant's submission that there is a risk that the entitlement to seek an additional award would be thwarted by the court proceeding to pronounce decree once the time for objections to the taxed account elapses. Such a motion can be lodged at the same time as the taxed account becomes available under OCR 32.3A, and prior to the expiry of the 14 days period for objections.

Disposal

[17] I will dismiss the appeal as incompetent. The respondent's position has been vindicated but parties requested the opportunity to make submissions on expenses and sanction for junior counsel. Parties should attempt to agree the position, but failing which within 21 days the clerk will thereafter fix a hearing, by written submission.